**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
| Revision of the Commission's Program | ) | MB Docket No. 12-68 |
| Access Rules | ) | |
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# COMMENTS OF CABLEVISION SYSTEMS CORPORATION


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**TABLE OF CONTENTS**

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| | | |
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## COMMENTS OF CABLEVISION SYSTEMS CORPORATION

Cablevision Systems Corporation ("Cablevision") submits these comments in response to the Further Notice of Proposed Rulemaking ("*Further Notice*") in the above-captioned proceeding.[1/] As detailed more fully below, the Commission should reject the proposals set forth in the *Further Notice* to establish new, categorical presumptions for challenges to exclusive arrangements involving cable-affiliated networks. The proposals are unnecessary and could effectively reinstate the exclusivity ban by improperly depriving programmers of fact-specific, case-by-case assessment of exclusivity complaints.

## INTRODUCTION AND SUMMARY

In the *Order*, the Commission correctly decided to lift the twenty-year *per se* ban on exclusive contracts involving cable-affiliated networks. Based upon its assessment of the growth and durability of competition in the market for distribution of video programming,[2/] the Commission determined that a case-by-case approach would better serve consumers by enabling it to make fact-specific assessments that take account of both the pro-competitive benefits and the potential adverse impact of any particular exclusive arrangement. As a result of the sunset,

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1/ *See Revision of the Commission's Program Access Rules*, Report and Order in MB Docket Nos. 12-68, 07-18,05-192, Further Notice of Proposed Rulemaking in MB Docket No. 12-68, Order on Reconsideration in MB Docket No. 07-29, FCC 12-123 (rel. Oct. 5, 2012)("*Order*").

2/ *Id*. ¶ 14.

cable-affiliated programmers now enjoy the same opportunity afforded other providers of content and intellectual property to use exclusivity to fuel new investment, broaden distribution, and expand viewership.

However, three proposals on which the Commission seeks comment could impose undue constraints on exclusivity through the back door of evidentiary presumptions that have no basis in law and would undermine the very reasoning animating the elimination of the exclusivity ban. The Commission should decline to adopt these proposals.

First, adoption of a presumption of unfairness for all exclusivities involving a Regional Sports Network ("RSN") is unwarranted. The vigorously competitive marketplace conditions and the availability of a case-by-case remedy for addressing anti-competitive exclusivity that prompted the Commission to lift the *per se* ban for all cable-affiliated programming, including RSNs, militate against presuming that all cable-affiliated RSN exclusivities are presumptively unfair. Such a presumption would contravene both the D.C. Circuit's admonition against preemptively treating all withholding of terrestrial programming as inherently "unfair,"[3/] and the Commission's decision to opt for a case-by-case assessment of unfairness in response to the court's decision.

Second, there is no basis for establishing a rule that a multichannel video programming distributor ("MVPD") challenging an RSN exclusivity should be presumptively entitled to a standstill. As the Commission itself has recognized, a presumption is only permissible if there is "a sound and rational connection" between the proved fact and the fact to be presumed. Here there is no connection whatsoever. The ministerial act of filing a complaint challenging an RSN exclusivity in no way renders the complainant likely to satisfy the four-part, fact-specific test for

3/ *See Cablevision Sys. Corp. et al. v. FCC*, 649 F.3d 695, 721-22 (D.C. Cir. 2011).

standstill relief. Moreover, presumptive entitlement to a standstill would discourage exclusivity and undermine the Commission's sunset decision by enabling a complaining MVPD to indefinitely block an exclusivity entered into by a rival distributor without any meaningful assessment of the specific factual circumstances at issue or the agreement's impact on the market.

Third, the Commission should decline to adopt a presumption of unlawfulness with respect to any exclusive arrangement involving a cable-affiliated programming network that was a party to another exclusivity deemed to have violated Section 628(b). This proposal would deny cable operators a full and fair adjudication of the merits of any challenge to an exclusivity involving a programmer deemed to have violated Section 628(b) in a different agreement in a different market with a different distributor. Such a rule would deter cable operators from using exclusivity, since their agreements could be deemed presumptively unlawful through no fault of their own. Further, the stifling of exclusivity engendered by this proposal would have a particularly adverse affect on new and niche programming services and local and regional news networks that depend upon exclusivity to attract investors and expand their market reach.

As a practical matter, adoption of the presumptions proposed in the *Further Notice* would come close to re-establishing the categorical prohibition against cable-affiliated exclusivity rejected in the *Order*. There is no basis upon which to ground a predictive judgment that the case-by-case assessment of Section 628(b) complaints previously employed by the Commission and endorsed in the *Order* would be inadequate to address potential anti-competitive exclusivity absent additional special presumptions. Accordingly, the proposed presumptions should be rejected.

## I. THE COMMISSION SHOULD NOT ESTABLISH A REBUTTABLE PRESUMPTION THAT AN EXCLUSIVE CONTRACT FOR A CABLE-AFFILIATED RSN IS AN "UNFAIR ACT."

The Commission should reject calls to adopt a rebuttable presumption that exclusivity involving a cable-affiliated RSN constitutes an "unfair" act that violates Section 628(b). Such a step, in tandem with the presumption of "significant hindrance" already adopted by the Commission, would nullify the thrust of the Commission's decision to sunset the *per se* ban for RSNs by effectively prejudging both elements of a Section 628(b) complaint in favor of complainant MVPDs challenging an RSN exclusivity.

The *Further Notice* recognizes that an evidentiary presumption is permissible only if (i) there is a sound and rational connection between the proved and inferred facts and (ii) proof of one fact renders the existence of another fact so probable that it is sensible and timesaving to assume the truth of the inferred fact until disproven.[4/] The *Order* itself, however, concluded that marketplace conditions are sufficiently competitive to warrant elimination of the *per se* ban for all categories of programming, including RSNs.[5/] Indeed, the *Order* expressly acknowledged that the Commission had previously determined that "withholding of a cable-affiliated RSN does not always have a significant competitive impact."[6/] Against that backdrop, it is neither sound nor reasonable to presume that all exclusivities involving cable-affiliated RSNs are presumptively both unfair and a significant hindrance to competition.

In contrast to the presumption of significant hindrance, which arose from an empirical study of the impact of withholding conducted by the Commission in the *Adelphia* proceeding,

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4/ *See Further Notice* ¶ 77; *Cablevision Sys. Corp.*, 649 F.3d at 716.

5/ *See Order* ¶ 49.

6/ *Id.*

there is no empirical evidence to support a presumption of unfairness.[7/] As noted in the *Order*, a determination of unfairness under Section 628(b) "requires 'balancing the anticompetitive harms of the challenged conduct against the pro-competitive benefits.'"[8/] Exclusivity for an RSN can have numerous pro-competitive benefits, including spurring investment that leads to the televising of new games, conferences, and sports, expanding the distribution footprint of an existing network, and incorporating new technologies and capabilities into the sports content being televised. There is no basis for the Commission to conclude that the anti-competitive harms of an RSN exclusivity will always outweigh the procompetitive benefits, particularly in light of the *Order's* recognition that the competitive impact of an RSN withholding depends upon "unique factors at play in individual cases," such as "whether the teams carried by the RSN are new and without an established following."[9/]

Adoption of a presumption of unfairness also would contravene the D.C. Circuit's decision in *Cablevision v. FCC* and the Commission's approach to the unfairness issue in the wake of that decision. The D.C. Circuit found the Commission's determination that certain acts of terrestrial programming withholding were categorically "unfair" to be arbitrary and capricious, and specifically cautioned against conflating the "unfairness" and "significant hindrance" prongs of Section 628(b).[10/] The court correctly noted that "the ability to enter into

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7/ *See Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements,* First Report and Order, 25 FCC Rcd 746, ¶ 52 (2010) (*citing Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, Assignors to Time Warner Cable, Inc., Assignees, et al.,* Memorandum Opinion and Order, 21 FCC Rcd 8203, ¶ 149 (2006)).

8/ *Order* ¶ 53.

9/ *Id.* ¶ 49.

10/ *Cablevision Sys. Corp.*, 649 F.3d at 721-22 ("The Commission responds that determining whether particular conduct is unfair represents only half the section 628(b) inquiry contemplated by their new regulations. Complainants must also show that an unfair act of terrestrial programming withholding has 'the purpose or effect of . . . hinder[ing] significantly'. . . But the case-by-case inquiry into purposes

exclusive contracts could create economic incentives to invest in the development of new programming by allowing a vertically integrated cable operator to differentiate its service and secure . . . its programming networks."[11/] Thus, an exclusive agreement can have an adverse impact on a complainant and still promote consumer welfare.[12/]

The Commission's treatment of the "unfairness" issue in the wake of the D.C. Circuit's decision also supports rejection of the proposed presumption. In the *Verizon v. MSG* program access complaint, the Commission correctly opted for a "case-by-case" approach to determining whether the withholding of a terrestrial RSN was "unfair" in violation of Section 628(b).[13/] The Commission assessed "the potentially anticompetitive and procompetitive aspects" of the withholding, including the potential consumer welfare benefits associated with the product differentiation strategy at issue, the business justification for that strategy, and the impact on the markets at issue.[14/] In upholding the Bureau's reliance on this case-by-case approach, the Commission expressly noted that the Bureau's resolution of the unfairness issue "was based on a careful weighing of the evidence presented in this case and does not prejudge future cases, including those involving non-replicable programming such as RSNs."[15/] Continued adherence

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or effects may fail to capture whether a particular act of terrestrial withholding should be considered unfair."). *See id.* at 722 ("But by labeling conduct unfair simply because it might in some circumstances negatively affect competition in the video distribution market, the Commission failed to consider whether it should treat conduct as unfair despite it being procompetitive in a given instance.").

11/ *Cablevision Sys. Corp.*, 649 F.3d at 721 (internal citations omitted).

12/ *See Verizon Telephone Companies and Verizon Services Inc. v. Madison Square Garden, L.P. and Cablevision Systems Corp*, 26 FCC Rcd 13145, ¶ 37 (2011) ("*Verizon v. MSG*") (noting that even though RSN withholding might result in "significant anticompetitive harms, . . . [other] factors could potentially tip the scales in favor of a finding that [the] withholding is procompetitive on balance" and, thus, is not "unfair" despite the impact on competition in the video distribution market).

13/ *Id.* ¶ 20.

14/ *Id.* ¶¶ 23- 41.

15/ *Verizon Telephone Companies and Verizon Services Inc. v. Madison Square Garden, L.P. and Cablevision Systems Corp.*, Memorandum Opinion and Order, 26 FCC Rcd 15849, ¶ 32 (2011) ("*Verizon/MSG Order on Application for Review*").

to this approach is not only compelled by the D.C. Circuit's decision, it is also the most sensible course for the Commission to take and thus compels rejection of the proposed presumption.

## II. A CARRIAGE STANDSTILL IS AN EXTRAORDINARY REMEDY THAT SHOULD NOT BE THE SUBJECT OF AN EVIDENTIARY PRESUMPTION.

The Commission should also decline to establish a rebuttable presumption that an MVPD complaining about exclusivity by an RSN should be entitled to a standstill of any existing license agreement it has with that RSN. There is no basis for presuming that the mere filing of a challenge to an exclusivity agreement involving a cable-affiliated RSN renders it probable that the complainant would satisfy the Commission's four-part test for a standstill of an existing programming contract during the pendency of a program access complainant.[16/] Because the requisite link between the proved fact triggering the presumption (the filing of a complaint challenging an RSN exclusivity) and the presumed fact (satisfaction of the four-part test for a standstill) is simply non-existent, the Commission cannot adopt the proposed presumption.

A standstill order requires a cable programming network to continue making its programming available after a contract has expired and before there has been any finding of a violation of the rules. The requirements for a carriage standstill are stringent because, like all injunctive relief, a standstill is an extraordinary measure.[17/] A complainant seeking such extraordinary relief should bear the burden of producing evidence showing that, *in its particular circumstances*, it is likely to prevail on the merits and that, in the absence of a standstill, will

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16/ Under the Commission's procedures, a complainant that seeks the standstill of an existing programming contract has the burden of proof to demonstrate that: (i) the complainant is likely to prevail on the merits of its complaint; (ii) the complainant will suffer irreparable harm absent a stay; (iii) grant of a stay will not substantially harm other interested parties; and (iv) the public interest favors grant of a stay. *See Further Notice* ¶ 78 (*citing* 47 C.F.R. § 76.1003(l)).

17/ *See, e.g.*, *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); *see also Washington Metropolitan Area Transit Comm'n v. Holiday Tours*, 559 F.2d 841 (D.C. Cir. 1977) (clarifying the standard set forth in *Virginia Petroleum Jobbers Ass'n v. FPC*); *Hispanic Information and Telecomm. Network, Inc*., 20 FCC Rcd 5471, 5480, ¶ 26 (2005) (affirming Bureau's denial of request for stay on grounds applicant failed to establish four criteria demonstrating stay is warranted).

suffer irreparable injury. Adoption of the proposed standstill presumption would allow a complainant to flip this process on its head through the ministerial act of filing a complaint. In this context, the proposed presumption is tantamount to establishing a presumption that the complainant is likely to succeed on the merits of that challenge and suffer irreparable harm – all without even a cursory examination of the facts and circumstances underlying the proposed complaint. Such an approach would be arbitrary and capricious.[18/]

A standstill presumption would also distort the marketplace by providing MVPDs unwilling to pay market rates or adhere to standard contract terms outsized influence over the manner in which programming is distributed. In such a circumstance, the affected programmer might seek to recoup some of the lost revenues through an exclusive arrangement with another distributor. By guaranteeing continued carriage during the pendency of a complaint challenging an RSN exclusivity, the standstill presumption would empower such an MVPD to block implementation of an exclusivity while continuing to press for unreasonable license terms. The practical result of such a presumption would be to substantially diminish – if not extinguish – the value of exclusivity for an entire class of programming, which conflicts with the *Order's* conclusion that marketplace conditions now warrant allowing all cable-affiliated programmers, including RSNs, to have recourse to exclusivity where appropriate.

[18/] Further, it would be particularly inappropriate to presume that a complainant would prevail on the third factor – whether the standstill would harm other parties – since the relief requested would seek to undo an exclusivity between the defendant-programmer and a third party distributor.

## III. THE COMMISSION SHOULD REJECT THE PROPOSAL TO PRESUME THAT INVALIDATION OF ANY EXCLUSIVITY INVOLVING A CABLE-AFFILIATED NETWORK RENDERS ALL OTHER EXCLUSIVITIES BY THAT NETWORK PRESUMPTIVELY UNLAWFUL UNDER SECTION 628(B).

Finally, the Commission should not adopt a rebuttable presumption that an exclusive arrangement involving a cable-affiliated programming network that was previously the subject of a successful program access complaint is both unfair and significantly hinders competition. Such a presumption would necessarily preclude the "individualized assessment of exclusive contracts" that the Commission has deemed the appropriate regulatory response to such complaints,[19/] and would fail to take full account of the particular characteristics and local market conditions associated with those contracts. The impact of exclusivity can differ across agreements and markets depending upon a number of factors, including the size and competitive characteristics of the market, the affected distributors, the viewership and popularity of the programming in the particular market, and the availability of substitutes for the programming at issue. The fact that an exclusive arrangement between a cable-affiliated programmer and a distributor might be found to be unfair and significantly hinder competition in a rural market in the West offers no basis for concluding that an arrangement between that same programmer and a different distributor would have the same impact in an urban market in the Northeast. The presumption proposed here, however, would completely eviscerate the Commission's determination in the *Order* that exclusive arrangements are most appropriately assessed on a case-by-case basis.

This proposal would have a particularly adverse and pernicious effect on cable operators that opt to enter into exclusive arrangements with a cable-affiliated programmer. An operator that performed its due diligence and carefully considered the balance between the pro-competitive benefits of such an arrangement and any potential adverse effects could nonetheless

19/ *Order* ¶ 3.

see that arrangement deemed to be presumptively unlawful through no fault of its own – but simply because of the adjudication of a different exclusive arrangement with a different distributor in a different marketplace. Such a regime would be inimical to fundamental fairness and due process. As a practical matter, an operator seeking to enter into an exclusive arrangement with a cable-affiliated programmer would have to factor in the potential competitive effect of any other exclusive agreement involving that programmer, since the invalidation of any single agreement could render all others presumptively unlawful. Even *assuming arguendo* that the contract confidentiality issues could be surmounted to enable such an assessment (and that the costs and burdens of such an inquiry did not offset the benefits of the proposed arrangement), the uncertainty created by such a presumption likely would deter cable operators from utilizing exclusivity in a pro-competitive fashion.

Inhibiting cable operators' willingness to enter into exclusive arrangements would have a particularly harmful effect on regional news networks and new and niche programming services. The Commission has long recognized that the ability of cable operators to offer local news and other local programming on an exclusive basis benefits the public by promoting investment in, and development of, such programming.[20/] Cablevision's award-winning News12 channels and its MSG Varsity high school sports services underscore this point. By raising the costs and risks

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20/ *See, e.g., New England Cable News Petition for Public Interest Determination Under 47 C.F.R. § 76.1002(c)(4) Relating to Exclusive Distribution of New England Cable News*, Memorandum Opinion and Order, 9 FCC Rcd 3231, ¶ 35 (1994) (noting that because of the limited geographic market for local and regional news and other local programming, "exclusivity may be important, if not, critical to . . . survival"). *See also Order* ¶ 35; *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage*, First Report and Order, 8 FCC Rcd 3359, ¶ 65 (1993) ("Particularly with respect to new programming, we recognize that there may well be circumstances in which exclusivity could be shown to meet the public interest test, especially when the launch of local origination programming is involved that may rely heavily on exclusivity to generate financial support due to its more limited appeal to a specific regional market."); *id*. ¶ 65 n.83 ("[I]t is possible that local or regional news channels could be economically infeasible absent an exclusivity agreement.").

associated with exclusivity, however, the proposed presumption would be particularly harmful to services such as these that rely on exclusivity to attract new investment and to facilitate growth of their distribution footprint and viewership.

## CONCLUSION

For the reasons described above, the Commission should reject the presumptions described in the *Further Notice*.

Respectfully submitted,

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